IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 202.

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

SUPPLEMENTAL BRIEF ON MOTION TO DISMISS OR AFFIRM APPEAL.

PURNELL M. MILNER,
Attorney for
Respondent, Defendant and Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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This application for certiorari to the Supreme Court of Louisiana seems to us to assert the right to substantive relief and a remedy in the State of Louisiana, under the saving clause of the original Judiciary Act of 1789, §9; Judicial Code §§24-256.

As presented to this Court, no question relating to or involving the Workmen's Compensation Act of the

State of Louisiana, Act 20 of 1914, either constitutionally or otherwise is raised.

There is also no question raised as to plaintiff in writ being engaged at the time of his injury under a maritime contract of employment on navigable waters of the United States; that is for the purpose of this action, the suit having been dismissed on exceptions of no cause of action and prescription. The allegations of the petition are taken for true.

The cause is, therefore, to be decided within very narrow limits.

The admiralty court's jurisdiction, in this case, is not denied.

The plaintiff, however, declines to pursue his remedy in the exclusive jurisdiction of the admiralty court, but asserts, under the saving clause of the Judciary Act of 1789, which saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it, that he has a right of action in the State Court of Louisiana under Article of the Civil Code 2315, reading: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc.

If this article of the Civil Code were in force and effect at the time of the injury and at the date of institution of his suit in the State Court, the plaintiff's contention would be correct.

But Article 2315 of the Louisiana Civil Code, in so far as furnishing an action and giving a remedy to Plaintiff, in the State Court, is concerned, was repealed and superseded by Act 20 of 1914, known as the Workmen's Compensation Act, repeatedly held constitutional by the Louisiana Supreme Court, Day vs.

La. Cent. Lumber Co., 144 La. An. 820. This was decided by the Supreme Court of Louisiana in

Williams vs. Blodget Construction Co., 146 La. An. 842-843.

Colorado vs. Johnson Iron Works, 146 La. An. 68.

Philips vs. Guy Drilling Co., 143 La. An. 951.

Despite this fact, plaintiff claims the right to proceed under Article 2315 of the Civil Code, which has been repealed since 1914.

This Court said in Knickerbocker vs. Stewart, 253 U. S. 149:

> "That clause of the provision granting exclusive admiralty and maritime jurisdiction to the Federal Courts (Judiciary Act, 1789, §9; Judicial Code §§24-256), which saves to suitors in all cases the right of a common law remedy, where the common law is competent to give it, refers to remedies for the enforcement of the Federal Maritime Law, and does not create substantive rights or assent to their creation by the States."

The Supreme Court of Louisiana, mindful of the repeal of article 2315 since Act 20 of 1914, and of its decisions so holding, adopted this statement of this Court and dismissed the plaintiff's suit.

The plaintiff's argument would seem to demand that some substantive relief or remedy be created for him in the state court or to assert, impliedly, as he does not directly, that the Legislature of Louisiana could not repeal Art. 2315 of the Civil Code.

He has not asserted that there exists in our United States Constitution any control of the actions that may be allowed or the remedies that may be granted

in a jurisdictional way by our state constitution to our Courts, nor has he pointed out any provision of the United States Constitution which prohibits in any manner the creation of remedies or actions for damages for injuries received or their repeal or modification as our Legislature may see fit to pass.

This Court said in State Industrial Commission vs. Nordenholt Corp., 259 U. S. 273-275: "Under the doctrine approved in Southern P. Co. v. Jensen, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' "

This Court in the Knickerbocker case explained that a "saving" clause operated to preserve something already in existence, not to create substantive rights; hence, we take it that, where a state recognizes either the common law remedy for actions for damages for injuries received or by statute creates a right of action and enforces a remedy, a suitor entitled to an action in damages in the Admiralty Court may take advantage of the actions and remedies afforded by the state statute and proceed accordingly.

But where no such action is accorded; where the rights and remedies formerly accorded have been repealed by the State Legislature, and there is no common law remedy afforded in the state practice, is it not too clear for argument that the suitor is relegated to his suit in admiralty?

Can he complain because a state has, within its plenary powers, unhampered by any provision or prohibition in the United States Constitution, failed to create a substantive right of action for damages for injuries in the State Court; or if such right formerly existed, has he any cause to complain if it is repealed?

If the "Saving Clause" of the Judiciary Act of 1789, §9 and Judicial Code §§24-256 did not "Create" these substantive rights and did not operate to compel their creation, then a suitor must take the State laws, actions and remedies as he finds them, and if a state affords neither a common law remedy nor a statutory remedy of which he may avail himself, under the jurisprudence of this Court, he is relegated to his suit in admiralty.

And thus he avails himself of all the rights, actions and remedies which the Constitution of the United States and our laws and jurisprudence accord.

For these reasons, we believe that the motion to dismiss or affirm the appeal taken should be granted.

PURNELL M. MILNER,
Attorney for
Respondent, Defendant and Appellee.

I certify I have received copy of the foregoing Brief.

CLAUDE L. JOHNSON,
Attorney for Petitioner, Plaintiff and Appellant.

Washington, D. C.,
March 8, 1927.